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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-5474

WILLIE C. ENGRAM,

*Petitioner,*

v.

UNITED STATES OF AMERICA

## PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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**PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS**

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Willie C. Engram petitions for a writ of certiorari to review the judgment of the District of Columbia Court of Appeals in this case.

## OPINIONS BELOW

The memorandum opinion of the Honorable William E. Stewart, Jr., of the Superior Court of the District of Columbia, ordering the Government to produce the criminal record of its witnesses three days prior to trial is unreported and is reproduced as Appendix A. The memorandum order of the Honorable John Penn of the Superior Court of the District of Columbia holding that the Government would not be permitted to call as witnesses any per-

sons whose records had not been produced is unreported and is reproduced as Appendix B. The opinion of the District of Columbia Court of Appeals reversing the orders of Judges Stewart and Penn is reported at 337 A.2d 488 (D.C. Ct. App. 1975) and is reproduced as Appendix C. The orders of the District of Columbia Court of Appeals denying rehearing and rehearing *en banc* are unreported and are reproduced as Appendix D.

## JURISDICTION

The judgment of the Court of Appeals was entered on May 14, 1975. A timely petition for rehearing and suggestion that the rehearing be *en banc* was filed on June 2, 1975, thereby tolling the time for filing a petition for a writ of certiorari. On June 24, 1975, the Court of Appeals denied the petition for rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

## QUESTION PRESENTED

Does a trial judge lack the power to compel the Government to produce the criminal records of witnesses whom the Government intends to call at trial when he finds that such records might reasonably lead to the development of evidence favorable to the accused and when the Government has access to, and routinely makes use of, the criminal records of defense witnesses in the preparation of its case?

## STATEMENT

On September 24, 1973, petitioner Engram was arraigned in the Superior Court for the District of Columbia with one Keith E. Gaffney on charges of rape, kidnapping, assault with intent to kill, robbery, and a variety of related and lesser included offenses. The case came on for a status hearing on April 1, 1974 before the Honorable William E.

Stewart, Jr. At that time, defense counsel informed the court that he had learned that many of the prospective Government witnesses had prior criminal records, and asked the court, pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), to order the production of those records seven days prior to trial. The prosecutor responded that while it was his "practice" to "provide records of any impeachable conviction on the day of trial," it was his position that criminal records were "not within the orbit of *Brady* as exculpatory, but simply something which I have access to because of the authority of the Government with the local police department as well as the FBI."

While indicating that he was inclined to order the Government to produce the requested records, Judge Stewart reserved decision and granted the Government's request for time to file a memorandum on the question. Both sides then briefed the issue, and on April 23, Judge Stewart entered a written opinion, wherein he ordered the Government to furnish defense counsel with prior conviction and arrest records of each Government witness by April 29, 1974—three days before the May 2, 1974 trial date. Judge Stewart reasoned that the withholding of these records "could result in an injustice" since the records were reasonably calculated to lead to exculpatory information. Appendix A, *infra*, at 2a. By way of example, the court noted that in addition to prior convictions admissible *per se* to impeach credibility, other criminal records relating to nonimpeachable convictions or mere arrests might reveal that the alleged Government eyewitnesses were incarcerated on the day of the offense or that Government witnesses who had been arrested and were awaiting trial might anticipate lenient treatment if they provided testimony favorable to the Government. Since this, or similar information, might be used to impeach the Government witnesses, the court held that *Giglio v. United States*, 405 U.S. 150 (1972) required the Government to produce the records.

The case was then called for trial before the Honorable John Garrett Penn, who had assumed Judge Stewart's felony calendar. At a hearing before Judge Penn, the Government acknowledged that it was planning to call witnesses with criminal arrest records and for purposes of the record, listed the names of such witnesses. But although the prosecutor at that moment had the records in his possession, he declined to obey Judge Stewart's order and turn them over to the defense. In light of the prosecutor's representation that the information would not be provided, Judge Penn entered a Memorandum Order on May 22, 1974, wherein he held that Judge Stewart's order would be enforced by precluding the Government from calling any person as a witness if that person's record was not furnished to defense counsel pursuant to Judge Stewart's order.

The Government filed an appeal pursuant to D.C. Code §23-104(a), and the District of Columbia Court of Appeals reversed, holding that under no circumstances does a trial judge have the power to order the production of criminal records. The court began its analysis by noting that the Government had agreed to produce, on the day of trial, conviction records of its witnesses admissible pursuant to D.C. Code §14-305.[1] The court then held that records not covered by §14-305 were inadmissible and reasoned that

[1] D.C. Code §14-305 provides that evidence that a witness has been convicted of a criminal offense shall be admissible for the purpose of attacking credibility if the offense was a felony or, if a misdemeanor, it involved dishonesty or false statement. However, even offenses falling within this category are inadmissible if the conviction has been "the subject of a pardon, annulment, or other equivalent procedure granted or issued on the basis of innocence," if it has been "the subject of a certificate of rehabilitation or its equivalent," or if a period of more than ten years has elapsed since the date of the witness's release from confinement imposed for his most recent conviction or the date of the expiration of the period of his parole, probation, or sentence imposed with respect to his most recent conviction, whichever is later.

*Brady v. Maryland, supra,* therefore did not mandate their production. The court reached this conclusion even though the trial judge, with first hand knowledge of the case, had concluded that there was a reasonable nexus between the records and the development of exculpatory evidence and even though the Government regularly utilizes the criminal arrest records of *defense* witnesses in preparation of its case.

## REASONS FOR GRANTING THE WRIT

Since the Court of Appeals did not in any way suggest that the trial judge abused his discretion on the facts of this case, its holding must be read as establishing a prophylactic rule prohibiting the pretrial disclosure of arrest records under all circumstances. This broadbased limitation on the power of a trial judge to compel the production of relevant facts is contrary to the repeated admonitions of this Court that "the adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played." *Williams v. Florida,* 399 U.S. 78. 82 (1970). See also *Wardius v. Oregon,* 412 U.S. 470 (1973); *Giglio v. United States, supra; Brady v. Maryland, supra.* Indeed, only a few weeks after the Court of Appeals decision in this case, this Court once again affirmed the inherent power of a trial judge to compel the production of relevant information. See *United States v. Nobles,* ____ U.S. ____ 95 S.Ct. 2160 (1975). The *Nobles* court held that

> While the adversary system depends primarily on the parties for presentation and exploration of relevant facts, the judiciary is not limited to the role of a referee or supervisor. Its compulsory processes stand available to require the presentation of evidence in court or before a grand jury.

____ U.S. at ____, 95 S. Ct. at 2166.

In reaching this conclusion, the Court relied upon its earlier decision in *United States v. Nixon*, 417 U.S. 683 (1974):

> We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial and speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

417 U.S. at 709.

Petitioner submits that by fashioning an absolute privilege prohibiting the disclosure of the criminal records of Government witnesses—a privilege with no foundation in statute or common law—the Court of Appeals plainly disregarded the mandate of *Nobles* and *Nixon*. Moreover, the court's failure to follow this mandate is particularly egregious since the court refused to permit defense access to the very information which the Government utilizes on a regular basis for the investigation and prosecution of its case. As the prosecutor himself stated, the prosecution has "access to [arrest records] because of the authority of the Government with the local police department, as well as the FBI." There can be no doubt that the prosecution makes regular use of this "access" in order to investigate defense

witnesses and make its own preparation for trial.[2] Yet when it is the defense which seeks access to the very same information to aid in the preparation of *its* case, the privacy rights of the witnesses suddenly predominate over the search for truth.[3]

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[2] As a local trial judge, familiar on a first hand basis with prosecution practices in this regard, has stated:

> The government is no stranger to the use of the resources of [the Metropolitan Police Department and the Federal Bureau of Investigation] for the altogether proper purpose of ascertaining the records of defendants and their known witnesses. It should have no complaint that it is asked to obtain from the same source the same data as respects its own witnesses, if the information is not directly available to the defense.

*United States v. Minor*, 101 Wash. L. Rep. 2085, 2089 (1973).

[3] This Court has emphatically rejected the argument that the Government's supposed interest in protecting the privacy of its witnesses is sufficient to preclude the disclosure of arrest records. See *Davis v. Alaska*, 415 U.S. 308 (1974). It did so, moreover, in a case where the privacy interest was a good deal stronger than that advanced here, since the records involved were those of a juvenile and their disclosure was precluded by statute. The Government in *Davis* resisted disclosure on the theory that it had

> an important interest in protecting the anonymity of juvenile offenders and that his interest outweighs any competing interest this petitioner might have in cross-examining [the witness] about his being on probation.

415 U.S. at 319. But Mr. Chief Justice Burger, writing for a majority of the Court, was unpersuaded:

> The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness. The State could have protected [the witness] from exposure of his juvenile

(Continued)

This Court has repeatedly condemned this sort of one-way discovery process. In *Wardius v. Oregon, supra,* for example, the Court struck down an Oregon discovery statute which permitted Government access to defense alibi witnesses without reciprocal defense access to Government witnesses. Noting that "this Court has . . . been particularly suspicious of state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial," 412 U.S. at 474 n. 6, the Court held

> In the absence of a strong showing of state interests to the contrary, discovery must be a two-way street. The State may not insist that trials be run as a "search for truth" so far as defense witnesses are concerned, while maintaining "poker game" secrecy for its own witnesses.

412 U.S. at 476. Similarly, in *Dennis v. United States,* 384 U.S. 855, 873 (1966), this Court held that

> In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact. Exceptions to this are justifiable only by the clearest and most compelling considerations.

One searches the Court of Appeals' opinion in vain for any indication of the "compelling considerations" which pre-

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[3] (Continued)

adjudication in these circumstances by refraining from using him to make out its case; the State cannot, consistent with the right of confrontation, require the petitioner to bear the full burden of vindicating the State's interest in the secrecy of juvenile criminal records.

415 U.S. at 320.

clude defense access to the criminal records sought in this case.[4]

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[4] The only interest suggested by the Court of Appeals opposing disclosure is the fear that release of arrest information would inevitably cause the premature revelation of the identity of Government witnesses which, in turn, might "lead to intimidation of witnesses." Appendix C, *infra*, at 18a. But the Court does not explain why it thinks such intimidation is likely or why protective orders could not be devised to prevent it. Indeed, the record here makes perfectly clear that, whatever the situation in some other case, there was *no* risk of witness intimidation or "premature" disclosure of the identity of witnesses in this case, since the defense *already knew the identity of all witnesses with records of arrest*. At the status conference on May 8, 1974, the Assistant United States Attorney made the following statement:

> Your Honor, for the record and for your information, those witnesses who would fall within the ambit of Judge Stewart's order are Ms. Evelyn Crawford, Ms. Barbara Owens, and Mr. Melvin McAdory.
>
> * * * * *
>
> I have made my investigation on the basis of local records of the Metropolitan Police Department, as well as the record check through the Federal Bureau of Investigation, and that is the information which my investigation reveals.

As a perusal of the indictment pending against Mr. Engram makes clear, each of these witnesses had previously been named in the indictment as complainants against Mr. Engram and Mr. Gaffney. Of course, petitioner's counsel had been in possession of the indictment, together with the names of Ms. Crawford, Ms. Owens, and Mr. McAdory since the day of Mr. Engram's arraignment. The Court of Appeals' suggestion that the revelation of these names, already in the defense's possession, would somehow lead to a greater risk of witness intimidation is difficult to comprehend. What the defense was seeking was not the identity or location of unknown prosecution witnesses, but rather the established criminal records of witnesses whose identity the defense already knew—records which were unavailable to the defense, but which the prosecution could obtain by merely picking up the telephone.

Of course, in *Wardius* and *Dennis*, the defense had no independent right of access to the material in question. Rather, the defense right was wholly dependent upon Government use of the same or equivalent information. This case is a stronger one for the defense than either *Wardius* or *Dennis* since here, the trial court's finding of a reasonable nexus between the records involved and the development of exculpatory evidence means that the defense had an independent due process right of access.

In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), this Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Nine years later, this Court put an important gloss on the *Brady* requirement when it held in *Giglio v. United States*, 405 U.S. 150, 154 (1972) that "when the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure or evidence affecting credibility falls within this general rule." See also *United States v. Deutsch*, 475 F.2d 55, 58 (5th Cir. 1973); *United States v. Hart*, 344 F.Supp. 522 (S.D.N.Y. 1971). *Cf. Napue v. Illinois*, 360 U.S. 264 (1959). Since there can be no doubt that a criminal record will often affect the credibility of a witness, numerous courts throughout the country have interpreted the *Brady-Giglio* requirements to mandate production of such records. See *United States v. Houston*, 339 F.Supp. 762, 766 (N.D. Ga. 1972); *United States v. Jepson*, 53 F.R.D. 289, 291-292 (E.D. Wisc. 1971); *United States v. Leichtfuss*, 331 F.Supp. 723, 726 (N.D. Ill. 1971); *United States v. Mavrogeorgis*, 49 F.R.D. 214, 215 (S.D.N.Y. 1969); *United States v. Minor*, 101 Wash. L. Rep. 2085 (1973); *United States v. Gibson*, 100 Wash. L. Rep. 1971 (1972); *United States v. Ahmad*, 53 F.R.D. 186, 192 (M.D. Penn. 1971); *United States v. Tanner*, 279 F. Supp. 457, 471-472 (N.D. Ill. 1967); *United*

*States v. Deardorff*, 343 F.Supp. 1033, 1044 (S.D.N.Y. 1971). *Cf. United States v. Deutsch, supra; Powell v. Wiman*, 287 F.2d 275 (5th Cir. 1971). Indeed, only a few weeks before the decision below in the instant case, a unanimous panel of the United States Court of Appeals for the same jurisdiction reversed a murder conviction because the prosecutor had failed to reveal pretrial the criminal records of the decedent. *United States v. Agurs*, __U.S. App. D.C. __, 510 F. 2d 1249 (1975). Petitioner submits that this case is in direct conflict with *Agurs*.[5]

[5] The *Agurs* case is particularly significant since one of the convictions involved in that case—a conviction for simple assault—is inadmissible for impeachment purposes under D.C. Code §14-305. The District of Columbia Court of Appeals specifically relied upon the alleged inadmissibility under §14-305 of the records which petitioner sought in denying that the trial judge had the power to order production. See pp. 12-14, *infra*.

Although the United States Court of Appeals declined a Government petition to rehear the *Agurs* case *en banc*, four active judges dissented from that decision and entered an opinion indicating why they would have granted rehearing. That opinion is of particular significance, since it makes clear that even those judges who disagreed with the *Agurs* result would not support the result reached by the District of Columbia Court of Appeals in the instant case. The four dissenting judges disagreed with the *Agurs* panel primarily because, as the panel acknowledged, defense counsel below had been aware of the decedent's criminal record, but had not requested production. The four dissenters read this Court's opinion in *Moore v. Illinois*, 408 U.S. 786 (1972) to mean that the Government's *Brady* obligation did not attach in the absence of a production request. Here, of course, the controversy concerning the production of criminal records was triggered by a specific defense pretrial request for access to them, so the dissenting judge's objection to the *Agurs* result is inapplicable.

While the four *Agurs* dissenters also disagreed with intimations in the panel opinion that past violent acts of the alleged victim of an assault could be introduced to buttress a self-defense claim, they specifically acknowledged that evidence concerning the reputation of the victim *was* admissible. Of course, in the instant case, the defense sought access to the arrest records of the Government complaining witnesses so that their reputation could be investigated. See pp. 14-15, *infra*.

The Court of Appeals' opinion does not cite, and makes no attempt to distinguish, either *Agurs* or any of the earlier authority. Instead, the court seems to have satisfied itself with the observation that the records which the defense sought could not be exculpatory, since they could not be directly introduced into evidence pursuant to D.C. Code §14-305. Appendix C, *infra*, at 17a.

This position is fatally flawed both in its premise and in the conclusion which the Court of Appeals derived therefrom. In the first place, the Court of Appeals' holding that D.C. Code §14-305 sets the outer bounds for the use of criminal arrest records to impeach witnesses is contrary to numerous decisions of this Court. For example, in *Alford v. United States*, 282 U.S. 687, 693 (1931), this Court held that, as a constitutional matter, the defendant was entitled to introduce in evidence the fact that a Government witness was in custody pursuant to a mere arrest because this fact tended to show that "his testimony was biased because given under promise or expectation of immunity, or under the coercive effect of his detention by officers of the United States, which was conducting the present prosecution." Of course, §14-305 makes no provision for the admissability of such arrests.

More recently, in *Davis v. Alaska*, *supra*, the Supreme Court addressed the question of impeachment through juvenile convictions. Although such convictions were inadmissable for impeachment purposes under an Alaska law comparable to D.C. Code §14-305, the Court held that the Confrontation Clause of the Sixth Amendment required their admission where the fact that the witness was presently under the jurisdiction of juvenile court was relevant to show bias. *Cf. Giles v. Maryland*, 380 U.S. 66 (1967). It would seem to follow from *Alford* and *Davis* that if the arrest records of government witnesses showed, for example, that numerous prior charges against them had been dismissed by the prosecution, the defendant could introduce

this fact into evidence and ask the jury to infer that their testimony was being given in return for favored treatment by the Government. See *Giglio v. United States, supra.* And surely the most serious constitutional questions would be raised if, on the facts of this case, the defense were precluded from showing that Government witnesses to the alleged rape had previously been convicted of giving perjured testimony in a rape trial, even if the conviction was earlier than the time limitations imposed by D.C. Code §14-305(b)(2)(B).

Thus, as the cases cited above clearly demonstrate, it is simply not the law that *only* those criminal records covered by D.C. Code §14-305 are admissible into evidence. Moreover, even if the Court of Appeals' position to the contrary were correct, so far as petitioner is aware, every other court which has considered the question has disagreed with the Court of Appeals' conclusion that only facts directly admissible into evidence can be *Brady* material. As the United States District Court held in *United States v. Ahmad,* 53 F.R.D. 186, 193 (M.D. Penn. 1971), "[W]e find that it is the duty of the prosecutor to disclose exculpatory material which might not be evidentiary itself but which might provide leads to other evidence." Similarly, in *Powell v. Wiman, supra,* the Fifth Circuit reversed a conviction on due process grounds because the Government had suppressed evidence indicating that its witness had committed a burglary, armed robbery, and kidnapping around the date of the alleged offense, although none of these crimes had resulted in an impeachable conviction directly admissible in evidence. And as Judge MacKinnon, speaking for the United States Court of Appeals for the District of Columbia has held,

> the prosecution may not suppress even the *means* of obtaining evidence. . . . Clearly, leads to *relevant* evidence cannot be withheld.

*United States v. Bowles,* 159 U.S. App. D.C. 407, 413, 488 F.2d 1307, 1313 (1973), *cert. denied,* 415 U.S. 991 (1974) (emphasis in original). See also *United States v. Bryant,* 142 U.S. App. D.C. 132, 138, 439 F.2d 642, 648 (1971); *Levin v. Clark,* 133 U.S. App. D.C. 6, 12, 408 F.2d 1209, 1215 (1967).

Surely, the trial judge did not abuse his discretion in finding that the criminal records sought by petitioner might produce leads to relevant evidence. As indicated above, the records might reveal a pattern of favorable treatment in exchange for testimony—a fact which would have significant impeachment value. See *Napue v. Illinois, supra.* Similarly, investigation into the circumstances of a witness's arrest might reveal that the defendant in the present case had been the complaining witness in the earlier case that had resulted in the witness's arrest—a fact which is obviously admissible to show bias even if the witness's arrest did not result in a conviction. See III A Wigmore on Evidence §949 at 790 and n.7 and cases cited therein. Finally, and most significantly, such an investigation is quite likely to uncover information concerning the witness's reputation and conduct in the community. Although the arrests themselves may be inadmissible, evidence of the prior bad acts which underlie the arrest and of reputation which can be uncovered by investigation of the circumstances of the arrest, may well be both admissible and highly relevant. See generally III A Wigmore on Evidence §§982-985 at 839-855. See also *United States v. Agurs, supra; United States v. Burks,* 152 U.S. App. D.C. 284, 470 F.2d 432 (1972). *Cf. United States v. Fox,* 154 U.S. App. D.C. 1, 473 F.2d 131 (1972). For example, since this is a rape prosecution, the importance of the discovery that the complainant has a long arrest record for prostitution need hardly be argued.

To be sure, since the Government has not yet produced the records in question and the leads resulting from production have not yet been pursued, we cannot now know with certainty whether, or what, exculpatory evidence will

in fact be found. But as the United States Court of Appeals for the District of Columbia Circuit held in *United States v. Bryant*, 142 U.S. App. D.C. 132, 138, 439 F.2d 642, 650 (1971), "Were *Brady* and its progeny applicable only when the exact content of the nondisclosed materials was known, the disclosure duty would be an empty promise."

The instant case is precisely analogous in this respect to *United States v. Deutsch*, 475 F.2d 55 (5th Cir. 1973), where the Government resisted the defendant's *Brady* demand for the personnel file of a postal inspector whom the defendant allegedly bribed. In reponse to the Government's argument that "the defendant has 'failed to show that the records which he sought to inspect contained anything favorable to him,' " the Court held "this is true, but it is not the answer to *Brady*. The burden is on the government to produce, not on the defendant." 475 F.2d at 58. See also *Williams v. Dutton*, 400 F.2d 797, 800 (5th Cir. 1968).

Thus, only when the records have been produced and the leads resulting from them pursued can we know for sure whether they will be productive. Requiring the defense to allege with specificity the results of an investigation before it can be given the tools necessary to conduct that very investigation is more in keeping with the justice Alice received in Wonderland than with the constitutional entitlements of a defendant in the United States. The defense in this case demonstrated to the satisfaction of the trial judge that investigations stemming from examination of the arrest records of the Government's witnesses were reasonably likely to be productive. Since that determination was not clearly erroneous, and since the prosecution regularly uses such records for its purposes, the Court of Appeals' prophylactic bar to the production of such records is unjustifiable.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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September 1975.

## APPENDIX A

SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

v. Criminal Nos. 73988-73
73989-73

WILLIE C. ENGRAM
and
KEITH E. GAFFNEY

### MEMORANDUM OPINION

These cases were reached for a status hearing on April 1. A trial date of May 2, 1974 is presently set as to both defendants. The defendant Gaffney has been indicted for additional offenses, in which the defendant Engram is not a co-defendant and a separate trial date has been scheduled on those charges on June 14, 1974.

At the time of the status hearing counsel for the defendant Gaffney advised the court that a number of the government witnesses have criminal records and he sought to have the government produce the records of the witnesses no less than seven days before trial. The Assistant United States Attorney to whom the case was assigned and who was participating in the status hearing, responded: "That has been my practice, Your Honor, to provide records of any impeachable conviction on the day of trial, which would be my intention in this case as well." Defense counsel argued in response that he was not only interested in impeachable convictions but that he wanted to see the records of the witnesses as it might lead to some further investigation which he would want to conduct and if only furnished the record of impeachable convictions on the day of trial, he would be foreclosed from any investigation.

The court afforded the government an opportunity to submit a memorandum in opposition to the defendant's oral motion for pretrial production of criminal records of government witnesses. The government complied and has submitted a memorandum placing its reliance upon Rule 16, of the Superior Court Rules of Criminal Procedure and a goodly number of authorities predating the teachings of the Supreme Court of the United States in *Brady v. Maryland*, 373 U.S. 83 and *Giglio v. U. S.*, 405 U.S. 150, as well as the learned opinion of Judge Braman, of this court, in *U. S. v. Minor, et al*, Criminal No. 4179-73.

The positive assertions of the government as to the holdings in these cases is not supported in a number of instances by a reading of those cases. The contention of the government that the material sought is not Brady material is unacceptable. Though it is true that the witnesses may only be confronted for impeachment purposes with prior convictions as to certain offenses, the delivery of such prior convictions on the day of trial does indeed deprive the defendants of the opportunity to investigate. The failure to provide information as to prior convictions of offenses which could not be used for impeachment purposes and the failure to provide information recorded in police records of prior arrests could result in an injustice. One need only reflect upon the possibility that a witness testifying as an eye-witness to the crime which is the subject matter of the indictment before the court may well have been in the custody of the police as the result of an arrest at the very time he claimed to be a witness or the witness may well have been languishing in a jail following a conviction of some minor offense, including a traffic charge, at the very time he claimed to have been a witness to the offense which is the subject of the indictment. The argument that exposure of the total record would do a grave misservice to the privacy of a citizen must give way under these circumstances to due process and the dictates of Brady.

In addition, the court is entitled to consider its own calendar and the effective administration of justice. The delivery of these records, in whole or in part, at the moment of the commencement of the trial could very well result in a request by defense counsel for an opportunity to investigate. To deny such a request under those circumstances would in the view of the court be error. Certainly, the court should not be faced with such delays that would necessarily follow.

It should also be added that this court can envision the possibility of witnesses who have been arrested and are pending trial and who, by reason of their own dilemma, are either expecting or anticipating some leniency by reason of their cooperation with the government in the instant cases. This possibility and the effect thereof is recognized in *Giglio* though the defendant in that case had not actually been indicted.

The government acknowledges the availability of the records of the witnesses in its memorandum and the government's ability, with a minimum of inconvenience, both to the Metropolitan Police Department and the Federal Bureau of Investigation, to provide evidence of convictions to the defense.

The court being of the view that the material sought is Brady material or possibly Brady material which might in turn lead to the discovery of evidence of an exculpatory nature and/or affecting the issue of guilt or innocence of the defendants hereby orders that the government furnish to counsel for the defendants the records of each of the government witnesses, such records consisting of all prior convictions for all offenses and all prior arrests, and it is further

Ordered, that such material be turned over to defense counsel by April 29, 1974.

April 23, 1974

William E. Stewart, Jr.
Judge

cc: M. Rankin, Esq.
Robert Golten, Esq.
Henry F. Schuelke, Esq.
Assistant United States Attorney

## APPENDIX B

SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

v. Criminal Nos. 73988-73
73989-73

WILLIE C. ENGRAM and
KEITH E. GAFFNEY

### MEMORANDUM ORDER

These cases came on for trial on May 2, 1974. On that date the Government requested a continuance over the objection of counsel for both defendants. The Government also advised the Court that it had not complied with the Memorandum Opinion entered April 23, 1974, by Judge William E. Stewart, Jr., in which he ordered that they turn over to defense counsel the records of all prior convictions and all prior arrests of the Government's witnesses. That information was to be turned over to counsel on or before April 29, 1974 (four days before trial date).[1] As stated above the Government advised the Court that it had not complied with the order, and further advised the Court that it had no intention of complying with the order absent a ruling by the Court of Appeals on this question.

I

After hearing arguments on the Government's motion for continuance this Court granted the continuance for several reasons. First, the defendants had indicated that

[1] This Court assumed Judge Stewart's Felony I Docket and Calendar effective April 29, 1974.

although they were ready for trial they were ready except that they had not had an opportunity to investigate the records of convictions or arrests of Government witnesses. With respect to that aspect of the case, the defendants are not ready due to the failure of the Government to comply with Judge Stewart's order.

Second, both defendants were represented by attorneys from the Public Defender Service, and counsel advised the Court on May 2, 1974, that they thought this would represent a conflict of interest.[2] Apparently, counsel felt that there was a likelihood of disposition, however, that has not developed. Accordingly, counsel representing Mr. Gaffney requested leave to withdraw as his counsel, and requested the Court to appoint new counsel. This representation was made on May 2, 1974, and the Court continued this matter over to May 8, 1974, so that a private member of the bar could be appointed to represent Mr. Gaffney.[3] On May 8, 1974, the Court appointed Mr. I.J. Crickenberger to represent Mr. Gaffney. Thus it is clear that although both defendants announced ready, actually, defendant Gaffney was not ready for trial since new counsel was only appointed on May 8, 1974, and since he could not have gone to trial with Mr. Golten due to the possible conflict of interest. Thus the continuance is not properly chargeable to the Government.

Last, while being required to continue the Gaffney case due to appointment of new counsel, the Court also continued the case of co-defendant Engram who announced ready for trial but for the failure of the Government to comply with Judge Stewart's order. However, Mr.

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[2] Mr. Michael Rankin represents Mr. Willie C. Engram and Mr. Robert Golten represented Mr. Keith E. Gaffney.

[3] The problem of appointment of counsel is aggravated by the lack of Criminal Justice funds, a matter of public knowledge and concern.

Engram is incarcerated and it must be noted that he is serving time on another charge.[4]

Taking all the above into consideration, the Court granted the continuance and these cases were continued over to August 15, 1974, the Court's first available date.

II

On April 23, 1974, Judge Stewart entered an order requiring the Government to furnish to counsel for the defendants "the records of each of the Government witnesses, such records consisting of all prior convictions for all offenses and for all prior arrests". That material was to be turned over to counsel for the defendants on April 29, 1974. In issuing his order Judge Stewart cited *Brady* v. *Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L Ed 2d 215 (1963).

This Court cannot and will not consider or reconsider the merits of the issue since Judge Stewart's Opinion is clearly the law of this case. Thus, the only issue remaining before the Court is whether sanctions should now be imposed against the Government, and if so, the nature of those sanctions. There is no reason to withhold a ruling on the sanctions to be imposed since the Government has advised the Court in open court in clear and unmistakable language that it does not intend in any way to comply with Judge Stewart's order.

There are three possible sanctions the Court can now impose. One is to order the cases dismissed as has been requested by counsel for the defendants. Such a sanction, in the view of this Court, is too harsh and really is not directed to the failure of the Government to supply information

[4] The Court is advised that defendant Engram's prior conviction is pending appeal.

concerning its witness. Second, the Court could hold counsel for the Government in contempt, but there again, the sanction would not be directed to the issue before the Court. Last, the Court could order that the Government not be permitted to call as witnesses in this case any person whose record has not been furnished to counsel for the defendants as provided by Judge Stewart's order.

In the opinion of the Court this last alternative is the most appropriate. Accordingly, the Government will not be permitted to call as a witness in this case any person whose record has not been furnished to counsel for the defendants pursuant to the order of the court entered on April 23, 1974. The sanction the Court now imposes is appropriate and is consistent with the sanction which would be imposed where the Government failed to comply with the so-called Jencks Act (18 U.S.C. §3500). In short, the Court will not permit the testimony of any of those witnesses. It is hereby

ORDERED that the Government is not permitted to call any person as a witness in this case unless, with respect to that witness, the Government has fully complied with the Memorandum Opinion entered by the Honorable William E. Stewart, Jr. on April 23, 1974.

Dated: May 22, 1974.

/s/ John Garrett Penn
JOHN GARRETT PENN
Judge

Copies to:

M. Rankin, Esq.

I. J. Crickenberger

Henry F. Schuelke, Esq.
Assistant U.S. Attorney

## APPENDIX C

## DISTRICT OF COLUMBIA COURT OF APPEALS

No. 8706

UNITED STATES, APPELLANT,

v.

WILLIE C. ENGRAM and KEITH E. GAFFNEY, APPELLEES.

Appeal from the Superior Court of the District of Columbia

(Argued February 20, 1975 Decided May 14, 1975)

*Donald E. Robinson, Jr.*, Assistant United States Attorney, with whom *Earl J. Silbert*, United States Attorney, *John A. Terry* and *Henry F. Schuelke, III*, Assistant United States Attorneys, were on the brief, for appellant.

*Louis Seidman* for appellee Engram. *I. J. Crickenberger*, appointed by this court, for appellee Gaffney.

Before KELLY and HARRIS, *Associate Judges*, and PAIR, *Associate Judge, Retired.*

PAIR, *Associate Judge, Retired*: This appeal, pursuant to D.C. Code 1973, § 23-104(a)(1), challenges an order entered in the Criminal Division of the Superior Court May 22, 1974, suppressing as evidence all testimony of prosecution witnesses whose criminal and arrest

records, if any, were not furnished pretrial to defense counsel.[1]

Appellees were charged by indictments returned December 23, 1973, with multiple criminal offenses, including rape, robbery, kidnapping, burglary, assault with intent to kill, all while armed, grand larceny and lesser included offenses.

At a status hearing April 1, 1974, counsel for appellees moved the court to require government counsel to furnish not less than seven days before trial the criminal and arrest records of government witnesses. Government counsel advised the court that consistent with the usual practice in his office he would furnish on the day of trial the record of any impeachable conviction of a prosecution witness. Counsel for appellees then represented to the court that:

> I'm not only interested in impeachable convictions, I would like . . . to see what their records look like, and it might lead me to some further investigation on my own, depending on what turns up in their record. If I'm just given the record of impeachable convictions on the day of trial, I'm foreclosed from any investigation.

Declaring that, in its view, the records requested were *Brady* materials[2] the court reserved any ruling on the

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[1] This order implemented the order of another Superior Court judge entered April 23, 1974, which required government counsel to "furnish to counsel for the [appellees] 'the records of each of the Government witnesses, such records consisting of all prior convictions for all offenses and for all prior arrests' ".

[2] *Brady v. Maryland*, 373 U.S. 83 (1963).

motion to permit the filing of an opposing memorandum. Thereafter by order entered April 23, 1974, the court granted the motion for the pretrial discovery requested saying:

> The failure to provide information as to prior convictions of offenses which could not be used for impeachment purposes and the failure to provide information recorded in police records of prior arrests could result in an injustice....

The cases were called for trial on May 2, 1974, before another Superior Court judge who in the meantime had assumed the felony calendar of the first judge. Informed that government counsel had not and would not comply with the April 23, 1974, order, the judge announced that in his view the order "established the law of the case" and that he would determine later the sanction to be imposed for its disobedience. The cases were then continued until May 8, for a further status hearing. When, on May 8, the proceedings were resumed the judge discussed with counsel the matter of an appropriate sanction for disobedience of the April 23, 1974, order and concluded that:

> [T]he Court should . . . treat it as though it was a matter under the Jencks Act;[3] . . . the sanction should be that the Court will suppress any testimony from those witnesses in which the Government has not supplied the information as ordered . . . .
>
> The Court will . . . accordingly enter a written order this afternoon, so that if the Govern-

[3] The Jencks Act, 18 U.S.C. § 3500, provides in (d) for the striking of the testimony of a witness upon the failure of the government to produce, as required by (b) and (c), any statement of such witness.

> ment wishes to take an appeal from that order, it may do so.

The court, however, entered no written order in these cases on the afternoon of May 8 but did, on May 22, enter a written order which reads in pertinent part:

> [T]he Government is not permitted to call any person as a witness in this case unless, with respect to that witness, the Government has fully complied with the Memorandum Opinion entered . . . April 23, 1974.

This appeal by the government from the May 22, 1974, order followed. We reverse.

We address at the outset challenges to this court's jurisdiction to entertain the appeal. Questioned first is the finality of the May 22, 1974, order for the purpose of an appeal.[4] The contention is that the order did not have the effect of denying the prosecution the use of evidence at trial because no attempt was made to present in open court the testimony of government witnesses.

This argument is wholly without substance. The May 22, 1974, order provides in language too clear for any doubt as to what was intended that the "Government is not permitted to call any person as a witness in this case unless . . . [it] has fully complied with the . . ." April 23, 1974, order. The government refused to comply with the order thus putting the case in the proper posture for an appeal. *See United States v. Ryan*, 402 U.S. 530 (1971). The May 22, 1974, order suppressing, as it did,

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[4] D.C. Code 1973, § 23-104(a)(1) provides:

> The United States . . . may appeal an order, entered before the trial of a person charged with a criminal offense, which . . . suppresses evidence, or otherwise denies the prosecutor the use of evidence at trial . . . .

the testimony of the government's principal witnesses "effectively terminated the prosecution" as did the orders in *District of Columbia v. M.E.H.*, D.C.App., 312 A.2d 561 (1973), and *United States v. Oliver*, D.C.App., 297 A.2d 778, 780 (1972). We hold, therefore, that the May 22, 1974, order was appealable under D.C. Code 1973, § 23-104(a)(1).

Appellees made at oral argument an additional jurisdictional claim, *i.e.*, that the notice of appeal was not filed within the ten-day period prescribed by our Rule 4(b)(1). What appears from the record is that when on May 2, 1974, the cases were called for trial before the second judge, he discussed with counsel the matter of an appropriate sanction to be imposed upon the government for the prosecutor's disobedience of the April 23, 1974, order of the first judge. The cases were then continued until May 8 for a further status hearing and at that time the judge announced:

> [T]he sanction should be that the Court will suppress any testimony from those witnesses in which the Government has not supplied the information ordered . . . .
>
> *The Court will . . . accordingly enter a written order this afternoon, so that if the Government wishes to take an appeal from that order, it may do so.* [Emphasis supplied.]
>
> • • • •
>
> [T]he Court will enter its order in writing and furnish a copy to all counsel, and the Government could take an appeal from that order....

On the same day a docket entry was made of the May 8, 1974, proceedings reflecting the judge's statements.

The court, as pointed out above, entered no written order in these cases the afternoon of May 8, 1974, but did enter on May 22, 1974, a written order consistent with the court's oral pronouncements during the May 8, 1974, proceedings. Said the court in the written order:

> Accordingly, the Government will not be permitted to call as a witness in this case any person whose record has not been furnished to counsel for the [appellees] pursuant to the order . . . entered on April 23, 1974. The sanction the Court *now imposes* is appropriate . . . . [Emphasis supplied.]

We hold, in view of the foregoing, that the sanction complained of by the government was imposed by the written order entered May 22, 1974. It must follow, therefore, that the appeal, filed as it was on June 3, 1974, was timely. *See United States v. Hark*, 320 U.S. 531, 534-35 (1944); *United States v. Lee*, —— U.S.App.D.C. ——, 501 F.2d 890 (1974).

We have examined carefully *United States v. Fraser*, D.C.App., 330 A.2d 761 (1975), and find it distinguishable on its facts. There the trial court granted orally a motion to suppress evidence. Immediately thereafter the prosecutor represented to the court:

> [A]s Your Honor knows, these matters are always reviewed by my superiors . . . to determine if appellate relief will be sought. . . . *If there is a decision to pursue an* [appellate] *remedy then I will prepare in writing for Your Honor to sign a written order confirming your findings here today.* [Emphasis supplied.]

On the same day a docket entry was made as follows: "Hearing on Motion to Suppress resumed and granted."

Thereafter the government decided to appeal and six days later the prosecutor submitted a draft order which the trial judge signed and entered "hereby" granting the motion to suppress for the reasons orally stated by the court at the hearing on the motion. Notice of appeal was filed within ten days after the entry of the written order but sixteen days after the trial court orally granted the motion to suppress. This court dismissed the appeal as untimely saying:

> The judge did not call for submission of a written order, thereby indicating a desire to delay a final ruling. Moreover, as the government observed, a written order, if submitted, would merely be an act "confirming" the earlier finding. In addition, submission of a written order was conditioned on a desire by the government to appeal.

In the case at bar it is too clear for further discussion that the second judge intended that the entry of a formal written order should condition the government's right to appeal for he stated repeatedly: ". . . [T]he Court will enter its order in writing and furnish a copy to all counsel, and the Government could take an appeal from that order".

Having thus disposed of appellees' jurisdictional claims we proceed to the disposition of the merits of this controversy. The issue is whether the trial court exceeded its jurisdiction when it suppressed as evidence the testimony of government witnesses whose criminal and arrest records were not furnished counsel for the appellees before trial.

Because the prosecutor offered to furnish at trial the records of any impeachable convictions,[5] we consider only

[5] D.C. Code 1973, § 14-305.

whether it was error to require the prosecutor to furnish such records before trial and to furnish also, before trial, any other criminal record and any arrest record, even though the arrest did not result in an impeachable conviction.

The two trial judges involved were apparently influenced to their respective rulings by the notion that criminal and arrest records of government witnesses are "Brady materials." Determinative of the issue presented, therefore, is the answer to a preliminary question, *i.e.*, whether discovery of such records from the prosecutor was compelled by the due process of law considerations that controlled the decisions in *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny.*

In *Moore v. Illinois*, 408 U.S. 786, 794-95 (1972), the Supreme Court said in reference to the doctrine of *Brady v. Maryland, supra*:

> The heart of the holding in *Brady* is the prosecution's suppression of evidence . . . *where the evidence is favorable to the accused and is material either to guilt or punishment.* Important, then, are (a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence. [Emphasis supplied.]

*See also Giglio v. United States*, 405 U.S. 150, 154 (1972), where the Court stressed that, "A finding of materiality . . . is required under *Brady* . . . ." Citing

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* There is no contention that the records were discoverable pursuant to Super. Ct. Cr. R. 16, nor is there any contention that the records were discoverable pursuant to the Jencks Act, 18 U.S.C. § 3500.

*Brady v. Maryland, supra,* the court said in *United States v. Bryant,* 142 U.S.App.D.C. 132, 137-38, 439 F. 2d 642, 647-48 (1971): "The standard of constitutional coverage thus has turned upon the extent to which the evidence is 'favorable' to the accused. . . . [I]t is the law in this circuit that the due process requirement applies to all evidence which 'might have led the jury to entertain a reasonable doubt about [appellee's] guilt,' . . ." [Footnote omitted.]

It would, in our opinion, defy reason to say that the records sought to be discovered in the cases at bar were evidence favorable to appellees or that such records were material in any way on the issue of appellees' guilt or punishment except to the extent that their use would be permitted by D.C. Code 1973, § 14-305, for impeachment purposes. *See Fenwick v. United States,* 102 U.S.App. D.C. 212, 214, 252 F.2d 124, 126 (1958). From this it must follow that the only legitimate purpose that could have been served by the discovery sought would have been to provide appellees' counsel with records ". . . which might be used to impeach the credibility of Government witnesses, in so far as those records might reflect convictions . . . for crime." *Simms v. United States,* 101 U.S.App.D.C. 304, 307, 248 F.2d 626, 629 (1957). *Sanford v. United States,* 69 App.D.C. 44, 46, 98 F.2d 325, 327 (1938).

The government is committed to furnish at trial the records of all impeachable convictions. Such records will then speak for themselves and since their use must be restricted to impeachment purposes, *Simms v. United States, supra,* no prior investigation would be necessary or productive. Consequently, we are not impressed that any proper or meaningful investigatory purpose could be served by their production before trial.

[681]

The same must be said in respect to the arrest records of government witnesses. In the first place, such records are not material on the issue of credibility since, without more, they indicate only that the person arrested was suspected of an offense. *Schware v. Board of Bar Examiners of the State of New Mexico*, 353 U.S. 232, 241 (1957); *United States v. Maynard*, 155 U.S.App.D.C. 223, 476 F.2d 1170 (1973); *Simms v. United States*, *supra; cf. United States v. Richter*, 488 F.2d 170, 175 (9th Cir. 1973). Appellees insist, however, that in the preparation of their defense the arrest records are required as possible leads to something incriminating or impeaching. But we have found nothing in *Brady v. Maryland*, *supra*, or in any other case relied upon by the appellees, which sanctions any such broad fishing expeditions into the affairs of government witnesses. Moreover as the Supreme Court said in *Moore v. Illinois*, *supra* at 795:

> We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case.

Aside from all of this there is real concern that early pretrial discovery will lead to intimidation of witnesses. This concern was given expression in the concurring opinion in *Harris v. United States*, 140 U.S.App.D.C. 21, 25, 433 F.2d 1127, 1131 (1970), where it was said:

> Witnesses need protection against intimidating threats and assault, the Government needs protection against their witnesses being compromised and society needs the protection of criminal convictions that would flow from the production of truthful testimony of criminal acts being presented in court.

*See also Davis v. United States*, D.C.App., 315 A.2d 157 (1974); *United States v. Eley*, D.C.App., 286 A.2d 239 (1972).

We conclude from all of the foregoing (1) that with the exception of records of impeachable convictions, the criminal records and the records of arrests involved were not discoverable as *Brady* materials, and that (2) the suppression of the testimony of government witnesses, as a sanction for disobedience of the discovery order, was in excess of the court's authority and, therefore, constitutes reversible error. *Cf. In the Matter of Iris Elaine Banks*, D.C.App., 306 A.2d 270, 274 (1973). *See also United States v. Ryan, supra.*

*Reversed and remanded for further proceedings not inconsistent with this opinion.*

## APPENDIX D

DISTRICT OF COLUMBIA
COURT OF APPEALS

[Filed June 24, 1975]

No. 8706 January Term, 1975

UNITED STATES,
Appellant,
v. 73988-73-A thru Z
73989-73-A thru Z -AA thru AE

WILLIE C. ENGRAM
and KEITH E. GAFFNEY,
Appellees.

BEFORE: Kelly and Harris, Associate Judges, and
Pair, Associate Judge Retired.

ORDER

On consideration of appellees' petition for rehearing, it is

ORDERED that appellees' aforesaid petition is denied.

PER CURIAM.

Copies to:

Honorable John Garrett Penn
Judge, Superior Court of the District of Columbia.
Clerk, Superior Court of the District of Columbia.

John A. Terry, Esquire
Asst. U.S. Attorney
Attorney for Appellant.

Louis Seidman, Esquire
601 Indiana Ave., N.W. 20004
Attorney for Engram.

I. J. Crickenberger, Esquire
Wire Building #1100, 1000 Vermont Ave. N.W.
Attorney for Gaffney.

DISTRICT OF COLUMBIA
COURT OF APPEALS

[Filed June 24, 1975]

UNITED STATES,
Appellant,

v. 73988-73
73989-73

WILLIE C. ENGRAM
and KEITH E. GAFFNEY,
Appellees.

BEFORE: Reilly, Chief Judge, Kelly, Fickling, Kern, Gallagher, Nebeker, Yeagley and Harris, Associate Judges, and Pair, Associate Judge Retired.

ORDER

On consideration of appellees' petition for rehearing en banc and it appearing that a majority of the judges of this Court are not in favor of granting said petition, it is

ORDERED that appellees' aforesaid petition is denied.

PER CURIAM.

Copies to:

Honorable John Garrett Penn
Judge, Superior Court of the District of Columbia.
Clerk, Superior Court of the District of Columbia.

John A. Terry, Esquire
Asst. U.S. Attorney
Attorney for Appellant.

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601 Indiana Ave., N.W. 20004
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